

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERLIGHT ELECTRONICS CO., LTD.,
and EMCORE CORPORATION,

Civil Action No.12-cv-11758
HON. GERSHWIN A. DRAIN

Plaintiffs/Counter-Defendants,

v.

NICHIA CORPORATION, and
NICHIA AMERICA CORPORATION,

Defendants/Counter-Plaintiffs,

v.

EVERLIGHT AMERICAS, INC.,

Defendant.

ORDER GRANTING NICHIA'S MOTION FOR LEAVE TO FILE SUR-REPLY [#375]

Presently before the Court is Nichia's Motion for Leave to File Sur-Reply, filed on September 22, 2014. The motion is fully briefed and for the reasons that follow, the Court will grant Nichia's motion.

The filing of a sur-reply is appropriate when new evidence relevant to a party's summary judgment motion becomes available after the completion of summary judgment briefing. *Mauer v. Deloitte & Touche, LLP*, 752 F.Supp. 2d 819, 824-25 (S.D. Ohio 2010); *Nolan LLC c. TDC Int'l Corp.*, No. 06-14907, 2009 U.S. Dist. LEXIS 47445, *4-5 (E.D. Mich. Jun. 5, 2009). Additionally, Rule 56(c) precludes the consideration of new evidence and argument in a summary judgment reply brief without providing the non-moving party adequate opportunity to respond. *Eng'g & Mfg.*

Servs., LLC v. Ashton, 387 F. App'x 575, 583 (6th Cir. 2010); *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 480-82 (6th Cir. 2003).

Here, Nichia has established good cause for granting its requested relief. Nichia should be permitted to bring the testimony of Mr. Bernd Kammerer, President and COO of Everlight Americas and CEO of Everlight Europe, to the attention of the Court because it is relevant to the issue of injunctive relief. The Court rejects Everlight's arguments that Nichia had this evidence long before summary judgment briefing began and that Nichia has not been diligent in the prosecution of this case. Additionally, the Court agrees with Nichia that a sur-reply is required with respect to the issues concerning the terms "white" and "white light" and marking, given that Everlight raised new arguments and evidence in its reply brief, and not, typical "rebuttal evidence" as it claims.

Accordingly, Nichia's Motion for Leave to File Sur-Reply [#375] is GRANTED.

SO ORDERED.

Dated: November 5, 2014

/s/Gershwin A Drain
GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE